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more important, the two houses staunchly defend their equal places in our national legislature.

JOINT RULES

From 1789 until 1876 the House and Senate observed joint rules that regulated various aspects of intercameral relations. Many of these joint rules dealt with the handling of measures, such as the transmittal of bills and resolutions between the chambers as well as their engrossment and enrollment. Other joint rules addressed such topics as conference committees (see below) and joint messages to the President. While the joint rules have lapsed, many of the "usages instituted by them remain."[9] A few examples of joint rules in effect during the first session of the 17th Congress (1821) illustrate their general purposes:

1. No bill or resolution that shall have passed the House of Representatives and the Senate, shall be presented to the President of the United States, for his approbation, on the last day of the session.
2. When a message shall be sent from the Senate to the House of Representatives, it shall be announced at the door of the House by the doorkeeper, and shall be respectfully communicated to the chair, by the person by whom it may be sent.
3. The same ceremony shall be observed when a message shall be sent from the House of Representatives to the Senate.
4. Messages shall be sent by such persons as a sense of propriety in each House may determine to be proper.
5. While bills are on their passage between the two Houses, they shall be on paper, and under the signature of the Secretary or Clerk of each House respectively.
6. After a bill shall have passed both Houses, it shall be duly enrolled on parchment by the Clerk of the House of Representatives, or the Secretary of the Senate, as the bill may have originated in the one or the other House, before it shall be presented to the President of the United States.
7. When a bill, or resolution, which shall have passed in one House, is rejected in the other, notice thereof is to be given to the House in which the same may have passed.

Interestingly, the joint rules expanded largely through a process of accretion. The "history of legislation between the two Houses as to these joint rules since their original adoption," noted Speaker Samuel J. Randall, of Pennsylvania, "has always been in the form of additions or amendments to these joint rules, which, without readoption, have continued to be recognized, accepted, and acted on."[10] Tacit consent, in short, often characterized each chamber's adherence to the joint rules as they existed at the time. Such was

[9] Asher V. Hinds, *Hinds' Precedents of the House of Representatives*, vol. 4, (U.S. Government Printing Office, 1907), sec. 3430, p. 311.

[10] Ibid.

the case of Joint Rule 22, which triggered the 1876 demise of all the joint rules.

Joint Rule 22 elaborated procedures for counting electoral votes for the President and Vice President. Adopted by both chambers in February 1865 without controversy and with little debate, the joint rules were never thereafter agreed to by either chamber but continued in force through implied concurrence.[11] For a dozen years, there was no controversy associated with Joint Rule 22. It was invoked and used in 1869 and 1873. The circumstances surrounding that joint rule changed dramatically, however, because of the controversial Hayes-Tilden presidential election of 1876 and because of growing Member concern with the rule itself.

Democrat Samuel Tilden was the early popular vote winner over Republican Rutherford Hayes, but doubt and controversy soon ensued over who actually won sufficient electoral votes to be declared the victor. Both candidates claimed disputed electoral votes in several states. Under the terms of Joint Rule 22, either house could invalidate the electoral votes of a state. But unlike 1865, when both chambers were controlled by Republicans, the House in 1876 was in Democratic hands and the Senate in Republican control. House Speaker Randall "committed himself early to reliance on the Twenty-second Joint Rule as the surest guide to an acceptable settlement for all concerned, backed as it was by precedent."[12] The Republican Senate, however, wanted no part of joint rule.

In January 1876, months before the November presidential election, the Senate debated Joint Rule 22 at length. Two noteworthy issues dominated the discussions. The first was whether either house, acting unilaterally, can abrogate a joint rule. If the two houses consented to a joint rule, some Senators argued, then both chambers must act to rescind it. This position did not prevail, for the Senate voted to repeal Joint Rule 22, largely on the ground that each chamber is constitutionally independent and free to change its procedures, including joint rules, without the assent of the other.[13]

The second issue involved counting electoral votes for President and Vice President. Senator Oliver Morton, (R., IN), employed vivid language to express his concern with the procedure.

> In my judgment, [Joint Rule 22] is unconstitutional. It is a monstrosity. It is the most dangerous machine for the purpose of bringing revolution upon the country that was ever invented. What is it? It provides that, when the two Houses come together to count the votes for President and Vice-President, if any Senator or Representative gets up and makes an objection to counting the vote of the State of Kentucky, for instance, though it may be of the most

[11] *Congressional Globe*, 38 Cong., 2 sess. (1865), p. 628.

[12] Sidney I. Pomerantz, " Election of 1876," in Arthur Schlesinger, Jr., ed., *The Coming to Power* (Chelsea House Publishers, 1972), p. 181.

[13] These twin issues were debated at length in January and December 1876. See *Congressional Record* (January 10, 17, 20, 25 and December 8 and 11, 1876), pp. 309–10, 431–39, 517–20, 602–04, 97–109, and 117–29, respectively.

> frivolous character—actually contemptible in its nature; it may be technical only—but if the objection is made, the two Houses then separate, and each House votes upon the objection. If the objection is sustained in one House and overruled in the other, the vote of the State is thrown out. It gives one House the power to disfranchise a State, and in fact to disfranchise all the States in the Union. [14]

When the 44th Congress, 2nd session, convened on December 4, 1876, Congress was enveloped by the Tilden-Hayes election controversy. With two sets of electoral returns reported by several states, and the presidential outcome hanging in the balance, the House and Senate's role in determining which states' electoral votes were valid would prove decisive. The Republican Senate continued in its opposition to Joint Rule 22. The Democratic House initially insisted that all the joint rules, including Joint Rule 22, were still in effect despite the Senate's action in the First Session rescinding the controversial joint rule. The "joint rules of two House are still in force," reaffirmed Speaker Randall on December 12. Republican Representative (and later President) James Garfield argued, to no avail, that the "Forty-fourth Congress has no joint rules" because the House failed to concur in the Senate's action in January 1876 approving all the joint rules, except Joint Rule 22. [15] Bicameral deadlock, in sum, resulted in the abrogation of the joint rules.

In the end, both houses agreed in late December to create separate House and Senate counting committees to resolve the impasse. Deluged with petitions and pleas for a workable compromise—"even the pulpit pleaded for concessions on both sides"—the House and Senate agreed to establish a 15-member Electoral Commission (with 5 members from the House, 5 from the Senate, and 5 from the Supreme Court) to help decide the disputed election. [16] Republican Rutherford Hayes was eventually declared President because the Electoral Commission awarded him all the electoral votes from the contested states.

In the wake of the Hayes-Tilden controversy, Congress enacted legislation in 1887 to resolve the electoral vote counting controversy. That law, which is still applicable today (3 USC Secs. 15–18), requires, in part, concurrent action by both houses to reject any electoral vote or votes. The procedure was last invoked, so far as is known, on January 6, 1969, when objections were raised in the House and Senate to counting an electoral vote from North

[14] *Congressional Record* (January 17, 1876), p. 435.

[15] *Congressional Record* (December 12, 1876), p. 147. At the end of the first session of the 44th Congress, the House temporarily suspended two joint rules and notified the Senate to that effect. The Senate replied, "there were no joint rules in force." See *Congressional Record* (December 8, 1876), p. 101.

[16] Pomerantz, "Election of 1876", p. 203. The Twelfth Amendment to the Constitution states: "The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted." The dilemma in 1876 was: counted by whom, the Democratic House or Republican Senate?

Carolina, which was cast for George Wallace rather than the presidential vote winner in that state, Richard Nixon.[17] Interestingly, House precedents state that the procedures set forth in Title III of the United States Code "are in effect constituted as a joint rule of the two House for the occasion and govern the procedures in the joint session and in both Houses in the event they divide to consider an objection" to counting an electoral vote or votes.[18]

More recently there have been discussions that involve reconsideration of the need for joint rules, or comparable analogous actions, such as during the deliberations of the 1993 Joint Committee on the Organization of Congress. (The 1945 and 1965 joint reform panels also heard testimony on improving bicameral relations.) For example, the joint explanatory statement of the conference committee (H. Rept. 102–176, 1991) accompanying the Legislative Branch Appropriations Act for fiscal year 1992 identified several principles of interchamber comity. They are:

1. The constitutional right of the Senate to govern matters falling within the Standing Rules of the Senate, and of the House of Representatives to govern matters falling within the Rules of the House of Representatives shall be respected by the other body.
2. More specifically, regarding standards for ethical conduct, those matters which are currently governed by Senate and House of Representatives rules, respectively, shall remain within the exclusive jurisdiction of each body to regulate. However, regarding government-wide statutory ethics rules, it is appropriate for the Senate and House of Representatives to cooperate in developing uniform principles for the Legislative Branch.
3. On matters involving the administration of the various offices and instrumentalities within the Senate and House of Representatives, respectively, the right of each body to establish its own rules, standards, and procedures shall be respected, recognizing, however, that both bodies have an interest in the total amount of funds appropriated for the Legislative Branch.

JOINT COMMITTEES

Joint committees have been used by Congress since the beginning of the republic to the present day. Most of the early joint committees were established for ceremonial or routine administrative purposes, as witness the first Congress when joint committees prepared conference rules, chose Chaplains, arranged for the inauguration of President Washington, assigned space in the Capitol building, and fixed a time for adjournment.[19] It was not until the

[17] *Congressional Record* (January 6, 1969), pp. 146–72.

[18] Lewis Deschler, *Procedure in the U.S. House of Representatives, 97th Congress* (GPO, 1982), p. 81. After 1876 there were efforts to readopt joint rules, but none was successful.

[19] George B. Galloway, *The Legislative Process in Congress* (Thomas Y. Crowell Co., 1953), p. 306.

decade from 1861 to 1871, the period of secession and reconstruction, that joint committees were employed for purposes of investigation and control.[20] For example, in December 1861 Congress created a watchdog Joint Committee on the Conduct of the War; four years later they established a Joint Committee of Fifteen. The latter joint panel formulated the congressional policy for reconstruction of the southern states. In the twentieth century there has been an increase in the use of joint committees for purposes of study, investigation, and oversight, a result of both the growth of the executive branch and the rise of new societal problems.

Witnesses who have testified at hearings on the organization of Congress since enactment the Legislative Reorganization Act of 1946 have suggested, according to George B. Galloway, the following reasons for making greater use of joint committees:[21]

1. To deal with problems of a special nature, e.g., scientific and technical problems.
2. To economize the time of busy legislators and administrators, avoiding the repetition of the same testimony before the twin committees of the two houses.
3. To secure the advantages of a joint staff, especially in areas where there is a limited supply of competent professional experts.
4. As a means of intercameral cooperation, coordination, and mediation between the chambers.
5. To minimize the use and influence of conference committees.
6. For reasons of secrecy and security in sensitive matters.
7. To maintain legislative equality between the two houses and prevent the Executive from playing one house off against the other.
8. To facilitate tighter liaison in legislative-executive relations.
9. To promote coordination in the legislative process via overlapping memberships with related committees.
10. To serve as "watchdogs" or protectors of administrative agencies and programs.

Major problems are associated with the creation of joint committees. Their utility is generally recognized whenever an issue develops that cannot be handled adequately by the existing committee structure, or whenever a consensus emerges in Congress that a joint committee is the best approach for resolving a particular problem. For example, the Joint Committee on Atomic Energy was established by the Atomic Energy Act of 1946 because of the nature of the subject. As Harold Green and Alan Rosenthal have pointed out:

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[20] Ibid.

[21] George B. Galloway, "The Joint Committee Device: History, Patterns, Rationale," Legislative Reference Service, June 23, 1960, pp. 5–6. See Robert C. Wigton, "Joint Legislative Mechanisms: An Untapped Reform Potential?" *Polity* (winter 1991), pp. 323–35.

> The legislative history of the 1946 Act does not provide a clear picture of the origin of this uniquely armed committee. One possible precedent for the establishment of a Joint Committee may be found in the informal practice that prevailed during the Second World War. During that time, the entire atomic program developed by the Manhattan Engineer District was kept from general Congressional scrutiny. Requests for appropriations were hidden in the budgets of a number of Executive Agencies and were passed on by the chairmen of the Senate and House Appropriations and Military Affairs Committees, who constituted an informal joint committee. At the same time, these four men were necessarily privy to secret developments in the atomic program. The proven feasibility of this arrangement and its success in preserving security during the war may have influenced the draftsmen of the 1946 Act in suggesting a joint committee.[22]

Although a joint committee may be useful both for the ideas it can generate and for its integrated approach to problem-solving, many legislators fear and oppose any new committee that may encroach upon the jurisdiction of an existing committee in Congress. Legislators are very sensitive to the powers and responsibilities of the committees on which they serve, and will very often oppose the formation of a committee that may become a rival center of power and prestige. For example, then-Representative Mike Monroney (D., OK) testified before a Senate committee evaluating the Legislative Reorganization Act of 1946 and stated: "But by way of warning, I feel that the most rigid tests should in the future be applied to the establishment of additional [joint] committees beyond those three already named. Otherwise the committee structure of the House and Senate will be badly confused again, this time with duplicating and overlapping statutory joint committees."[23] Senator John Bricker (R., OH) added: "It seems to me joint committees should be held to a minimum or, putting it the other way, if we go too far in creating joint committees we get away from the bicameral makeup of the Congress."[24] Some lawmakers, in brief, express concern that joint panels may promote overly close relationships that limit critical scrutiny for a subject area. This argument was raised, for example, against the Joint Atomic Energy Committee.

Three other intercameral problems exist in relation to the formation of joint committees. The first concerns the determination of which house shall appoint the chairman. So jealous of its powers are the two branches of the legislature that conflicts sometimes have erupted over this issue, though during earlier periods it was usually resolved in favor of the Senate. For example, "The Senate

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[22] Harold P. Green and Alan Rosenthal, *The Joint Committee on Atomic Energy: A Study in Fusion of Governmental Power* (The George Washington University, 1961), p. 4.

[23] Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (Duell, Sloan and Pearce, 1947), p. 82.

[24] Hearings, Joint Committee on the Organization of the Congress, 89 Cong., 1 sess., pt. 8 (August 3, 1965), p. 1281.

had always insisted on having the chairmanship of any joint committee, but Representative John Nance Garner (D., TX) at once made the point that, in view of the fact that the Constitution gave to the House the sole authority to originate revenue bills, the chairman of this committee (Joint Committee on Internal Revenue Taxation) should be a House member, and some Senate Members agreed that this position was well taken."[25] Today, the leadership of all joint committees, including Taxation, rotates each Congress between the two houses.

A second difficulty that has arisen on occasion in joint committees concerns voting. The practice has been to appoint an equal number of Representatives and Senators to a joint committee, thereby creating a situation in which tie votes can occur. Because joint committees, with the exception of the one on Atomic Energy, rarely have legislative power (the authority to receive and report measures), this has not proven to be a major difficulty.

Finally, some hold the view that Senators often show a marked lack of interest in joint panels. As Professor Holbert Carroll wrote: "The prestige, traditions, composition, and procedures of the Senate, all strongly re-enforced by its special constitutional powers, discourage close cooperation between the two chambers."[26] In 1977, for instance, the Senate accepted the recommendations of its Temporary Select Committee To Study the Senate Committee System to eliminate several joint committees; the House agreed to the changes. And in 1993 the Senate members of the Joint Committee on the Organization of Congress recommended the abolition of all joint committees. However, neither house acted on this recommendation, leaving in place four joint committees: the Joint Economic Committee and the Joint Committees on Taxation, on the Library, and on Printing. None of these committees is directly involved in reviewing or initiating legislation. Instead, they conduct valuable studies on economic conditions and trends, provide essential expertise to the House Ways and Means and Senate Finance Committees as they consider tax legislation, and oversee two institutions of special importance to both the House and the Senate—the Library of Congress and the Government Printing Office.

Conference Committees

The Constitution states that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States" (Article I, Sec. 7). This provision implicitly requires that both houses must pass legislation in exactly the same form before it is eligible for presidential consideration. What the Constitution leaves unspecified, however, is how bicameral disagreements on measures are to be reconciled when the House and Senate pass different versions of the same bill.

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[25] *Hearings*, Joint Committee on the Organization of the Congress, p. 1277.

[26] Holbert N. Carroll, *The House of Representatives and Foreign Affairs*, (University of Pittsburgh, 1958), chap. 14.